

TENTATIVE RULINGS for CIVIL LAW and MOTION

October 3, 2012

Pursuant to Yolo County Local Rules, the following tentative rulings will become the order of the court unless, by 4:00 p.m. on the court day before the hearing, a party requests a hearing and notifies other counsel of the hearing. To request a hearing, you must contact the clerk of the department where the hearing is to be held. Copies of the tentative rulings will be posted at the entrance to the courtroom and on the Yolo Courts Website, at www.yolo.courts.ca.gov. If you are scheduled to appear and there is no tentative ruling in your case, you should appear as scheduled.

Telephone number for the clerk in Department Fifteen: (530) 406-6722

TENTATIVE RULING

Case: **Devore v. California Highway Patrol**
Case No. CV PO 12-399

Hearing Date: **October 3, 2012** **Department Fifteen** **8:30 a.m.**

Plaintiffs shall ensure that proof of service is filed for all papers filed with the Court. Future submissions without proof of service will not be considered by the Court.

The Court notes that attorney Jeffrey E. Gewirtz, with Georgia bar license number 292434, appears in the caption of plaintiffs' opposition. The Court has no record of Mr. Gewirtz applying to appear in this Court pro hac vice on behalf of plaintiffs in this case. (Cal. Rules of Court, rule 9.40.) Attorney Gewirtz is **DIRECTED TO APPEAR** to advise the Court of the status of his application.

Defendants California Highway Patrol and Justin Ross Sherwood's objection to the declaration of attorney Scott Love is **SUSTAINED** with respect to paragraphs 2, 4, 5, 6, and 7. The objection is **OVERRULED** with respect to paragraph 3, as plaintiffs properly request judicial notice of the fact of an appeal in their points and authorities. (Opposition, p. 7:4-5; Evid. Code, ¶§ 453.) A demurrer may only be used only to challenge defects that appear on the face of the pleading under attack; or from matters outside the pleading that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The Court takes judicial notice of the notice of appeal filed on July 2, 2012, in Case No. CV PT 12-398, and grants defendants' request for judicial notice of Exhibit 1. (Evid. Code, § 452, subd. (d).)

Defendants' demurrer to the complaint on the ground that collateral estoppel bars the action is **OVERRULED**. Because the Court's judgment in Case No. CV PT 12-398 is pending on appeal, the Court declines to apply collateral estoppel at this time to the judgment entered on plaintiffs' petition for late claim relief. (*Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 936-37.)

Defendants' demurrer to the complaint on the ground that plaintiffs fail to state facts sufficient to constitute a cause of action against defendants based on statutory governmental immunity is **OVERRULED**. (Code Civ. Proc., § 430.10, subd. (e).) Defendants do not address why the cited basis for an exception to defendants' immunity in plaintiffs' complaint, Government Code section 815.6, does not apply based on the complaint's allegations.

Defendants' demurrer to plaintiffs' claim for punitive damages is **OVERRULED**. A demurrer is not the proper procedural vehicle for challenging punitive damages claims. (See e.g., *Commodore Home Systems, Inc. v. Sup. Ct. (Brown)* (1982) 32 Cal.3d 211, 214-15.)

If no hearing is requested, this tentative ruling is effective immediately. No formal order pursuant to California Rules of Court, rule 3.1312, or further notice is required.

TENTATIVE RULING

Case: **Robbins v. American Metals Corporation**
Case No. CV CV 12-846

Hearing Date: **October 3, 2012** **Department Fifteen** **8:30 a.m.**

The Court rules on defendant American Metals Corporation's demurrer to plaintiff Patrick Robbins's first amended complaint ("FAC") as follows:

The demurrer to the first cause of action for retaliation and violation of Labor Code sections 232.5 and 6310 is **OVERRULED**. Plaintiff's allegation that in March 2011 he stated, "[m]aybe I should call OSHA," is sufficient to support a finding that defendant preemptively terminated plaintiff's employment in anticipation of plaintiff filing a workplace safety complaint. (Code Civ. Proc., § 430.10, subd. (e); Lab. Code, § 6310; *Lujan v. Minagar* (2004) 124 Cal.App.4th 1040, 1045-1046; *Blank v. Kirwan* (1985) 39 Cal.3d 311; FAC, ¶¶ 12-13, 18-19.)

The demurrer to the second cause of action for retaliation and violation of Labor Code sections 1102.5 and 6311 is **SUSTAINED WITH LEAVE TO AMEND**. Plaintiff fails to allege that he *refused* to perform work, or participate in an activity, that would have violated a statute, regulation, or rule. (Code Civ. Proc., § 430.10, subd. (e); Lab. Code, §§ 1102.5, 6311; *Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 322; *Blank v. Kirwan* (1985) 39 Cal.3d 311; FAC, ¶¶ 12-13, 18-19.)

The Court rules on defendant's motion to strike portions of plaintiff's FAC as follows:

The motion to strike paragraphs 23, 37, 44, and 48 is **DENIED**. (Code Civ. Proc., § 435 et seq.; Civ. Code, § 3294; 29 C.F.R. § 825.400; *Turman v. Turning Point of Cent. California, Inc.* (2010) 191 Cal.App.4th 53, 63; *Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 715-716.)

The motion to strike paragraph 29 is **GRANTED**, as the demurrer to the second cause of action for retaliation and violation of Labor Code sections 1102.5 and 6311 was sustained with leave to amend. (Code Civ. Proc., § 435 et seq.)

The notices of motion do not provide notice of the Court's tentative ruling system as required by Local Rule 11.4(b). Counsel for moving party is ordered to notify the opposing party or parties immediately of the tentative ruling system and to be available at the hearing, in person or by telephone, in the event the opposing party or parties appear without following the procedures set forth in Local Rule 11.4(a).

If no hearing is requested, this tentative ruling is effective immediately. No formal order pursuant to California Rules of Court, rule 3.1312, or further notice is required.